No. 15,216

IN THE

United States Court of Appeals

For the Ninth Circuit

HUNT FOODS, INC.,
Appellant,

vs.

WELLINGTON PHILLIPS
and H. W. LIHOLM,
Appellees.

BRIEF FOR APPELLANT.

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STATEMENT OF JURISDICTION.

District Court.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Southern Division, in a civil action awarding plaintiffs $21,500 for damages for breach of oral contract. It is also an appeal, in the same action, from a judgment in favor of defendant Hunt Foods, Inc. for $11,495.16 due on trade acceptances in that said judgment failed to award defendant $2,029.63 interest from the due date of the trade acceptances and failed to award defendant attorney fees pursuant to the terms of the trade acceptances.

The complaint for damages for alleged breach of oral contract was filed in the Superior Court of Alameda County, California, asking damages against appellant in the sum of $380,000 (Trans. pp. 16-17) and was removed to the said District Court by defendant Hunt Foods, Inc., a Delaware corporation, appellant here, under Sections 1441 and 1446 of Title 28 U. S. Code (Trans. p. 6). Thereafter appellant filed in the said District Court its answer, counter-claim and cross-complaint (Trans. p. 19), alleging the actual arrangement between the parties and pleading, among other things, three trade acceptances in appellant's favor on which the principal amount due was $11,495.16. The District Court had jurisdiction under Sec. 1332, Title 28, U. S. Code.

Court of Appeals, Ninth Circuit.

The judgment of the District Court was entered June 7, 1956. Notice of appeal was filed June 18, 1956. Appellant's bond was approved by the trial judge and was filed June 18, 1956. Under Rule 73(a) and Sec. 1291, Title 28, U. S. Code this Court has jurisdiction.

I.

CONCISE STATEMENT OF THE CASE.

(A) SUMMARY OF THE FACTS.

The appellees are a limited partnership composed of Wellington Phillips, H. W. Liholm, general partners, and Overseas Trading Corporation, limited partner. The appellant is a Delaware corporation doing

business in California and throughout the United States in the canning and selling of foodstuffs. From October, 1950, when appellees first entered business, until December, 1951, the partnership was engaged partly in selling foodstuffs as a broker but principally was engaged in what is known as a "bidding business", i.e. bidding on food items in the grocery field according to specification and not according to brand. Such a type of business is substantially different from the sale of items by brand to government commissaries.

As of December 1, 1951, the partnership, through Phillips, was designated orally by one Flynn, the district manager of appellant's Hayward sales office as a jobber to purchase and resell Hunt products to 21 specified government commissaries. This was an entirely new type of business for appellees.

The appointment was exclusive only in the sense that Hunt itself would not have its three salesmen sell to these specific commissaries. It was *not* exclusive to the extent of limiting the regular business of appellees, and appellees were free to sell competitor's products except as a jobber to the specified commissaries.

Phillips is the only partner that anyone at Hunt has ever seen or communicated with. Appellees' case is based on Phillips' testimony of the conversations he had with Flynn, the district manager of the Hayward sales office of appellant. Therefore, for convenience sake, we will sometimes refer to appellees, collectively, as Phillips and to appellant as Hunt.

Flynn died in December 1953 long before Phillips asserted any contract. The oral arrangement was not made with any executive of Hunt and no officer of Hunt knew of any contract such as that asserted in this action. In so far as the officers of Hunt knew, that company was selling some products to Phillips who resold to government commissaries, either party being free to discontinue at any time.

Appellees commenced operations for Hunt in December, 1951 and the arrangement was terminated by Hunt in April, 1953. The Court found that the arrangement was for an indefinite period and that, when Hunt terminated sales to Phillips after 16 months of operation, it had breached the contract because the oral contract was to run for some longer but undetermined period of time.

Under the oral contract, as testified to by Phillips, he could not be required to purchase any quota or other minimum amount of goods from Hunt. Under the oral contract, as shown by the uncontradicted evidence, Phillips was free to and did continue to carry on his brokerage and bidding business for customers other than Hunt. During the first year of the period Phillips handled Hunt's products, he did over a quarter of a million dollars in his "bidding" business involving products of other manufacturers and he increased his profits on brokerage for others by 40%.

Virtually from the start of their relationship, Phillips failed to pay when due for merchandise de-

livered. Every credit arrangement was violated by him. At the time of termination, in April, 1953, he owed Hunt approximately $25,000, much of which was owed for goods delivered by Hunt four months earlier. This default justified termination.

Phillips never had the financial resources to handle the job undertaken. He could not continue unless Hunt undertook to be a banker, a task which could not and was not assumed by Hunt.

There is a complete absence of evidence to support a finding of damages to appellees. There is nothing in the record to show the actual sales of Hunt products made by Phillips in the 16 months. There is no evidence of the actual profit made by appellees on these sales. There is no evidence of appellees' expense of handling the Hunt account. Phillips relies upon guesses, surmises, and speculation in place of introducing the actual facts of his performance.

Subsequent to termination, Phillips made payments on the Hunt balance so that by August, 1953, the balance due Hunt was reduced to $13,319.37. Phillips then accepted three trade acceptances each in the sum of $4,439.79, representing this balance due to Hunt. These acceptances were due, respectively, on October 1, 1953, November 1, 1953, December 1, 1953. Phillips paid $1,824.21 on the first trade acceptance. The balance of $2,615.55 on this acceptance was never paid, and no payments were ever made on the other two acceptances, leaving $11,495.16 principal due. Each of the trade acceptances provided for reasonable attorneys' fees if suit were instituted for collection.

The Court awarded Hunt judgment for the principal balance of $11,495.16 due but failed to include interest from maturity date or attorneys' fees, as provided in the documents. The Court also awarded Phillips $21,500 damages but the Findings do not show any basis for computation of damages.

(B) SUMMARY OF LEGAL QUESTIONS.

(1) Reason for Termination need not be stated

(2) The Arrangement was terminable at will

(3) Lack of Mutuality makes the contract terminable at will

(4) The Statute of Frauds is a Defense and Estoppel is not applicable

(5) Any term, indefinite or not, which is for more than a year, is within the statute

(6) No one had authority to bind Hunt for more than one year

(7) Prospective damages not awarded to a new enterprise

(8) There is no evidence to support a damage award to Phillips

  (A) The best possible proof must be given

  (B) Guess and conjecture are not sufficient

  (C) Contingent future bargains render damages uncertain

  (D) Phillips' dilemma

(E) Total lack of proof of Phillips' expense of doing business

(F) No proof of profit or losses after termination

(G) No proof of ability to perform

II.

SPECIFICATIONS OF ERRORS IN THE FINDINGS.

There were many material errors in the Findings. The District Court also failed to find on several material issues.

The Findings, as signed, are at pages 36 to 42 of the Transcript of Record. Appellant duly filed proposed Modifications of Findings (Tr. pp. 43-53) and the reasons therefor, none of which were adopted.

(A) ERRORS RELATIVE TO APPEAL FROM JUDGMENT AWARDING APPELLANT ONLY $11,495.16, AND OMITTING INTEREST, ATTORNEYS' FEES AND COSTS.

Finding XII (Trans. p. 41) makes no reference to the provisions of the Trade Acceptances under which Phillips was bound to pay all costs of collection including attorneys' fees and fails to award attorneys' fees. This Finding also fails to specify interest on the liquidated amounts from date of maturity. Computation of the interest and attorneys' fees is set forth in

Appellant's Proposed Modification to this Finding (Trans. pp. 50-52).

(B) ERRORS RELIED UPON IN APPEAL FROM JUDGMENT AWARDING DAMAGES TO PHILLIPS.

Specification No. 1—Findings relating to the nature of the arrangement.

Finding III (Trans. pp. 37-38) finds that Phillips was orally appointed an exclusive jobber for Hunt's to purchase and resell Hunt products to designated commissaries for an unspecified period of time commencing December 1, 1951 and that Phillips agreed to promote the sale of Hunt products and to perform the duties and obligations of an exclusive military jobber.

The alleged oral contract was made in the course of conversations between Phillips and one Flynn, then sales manager of the Hayward office of Hunt (Trans. p. 170). (Since Flynn died in December 1953 (Trans. p. 432) long before Phillips asserted any oral contract, the only direct testimony of what was agreed to is that of Phillips himself.)

Phillips says he told Flynn that he was willing to buy Hunt products and resell to the commissaries in Northern California if he could be assured of having the arrangement for a 10-year period (Trans. p. 103) because he would probably make little profit at first. The Court disbelieved him on this and held that an arrangement for an indefinite period resulted. Phillips could resell at any price he thought desirable (Trans. p. 121); there was no quota or

minimum amount of purchases. Phillips testified as follows (Trans. p. 232):

"Q. Was there any minimum number of purchases that was established; that you would have to purchase any minimum amount of canned goods?

A. None."

Phillips retained the right to devote as much time as he wished to work for others in his regular business —bidding and brokerage. How substantial a business he did for others while handling Hunt products will be shown in the discussion under the next succeeding specification of error.

There is no evidence as to what are the "duties and obligations" of a jobber or whether they were ever discussed; hence the finding is without basis. The complaint alleges only that appellees agreed to "promote the sales" [Par. IV (4) Trans. p. 11]. There was no "compensation" payable to appellees.

Phillips' conduct at and subsequent to termination shows there was no contract that was to continue. It is significant that at this termination meeting Phillips did *not* claim he had any contract or other non-terminable arrangement with Hunt (Trans. p. 427). He accepted the fact of termination. In the nine months between the date of termination and early 1954, numerous letters (e.g. Ex. H, I, J, K) passed between the parties. *In none* of these *does Phillips claim any contract.* He introduced a copy of a *purported* letter dated March 14, 1953 to Mr. Miller (Exhibit 6). This was never received at Hunt's (Trans. p. 453). Phillips never mentioned it in Ex-

hibit H, his letter of a month later, nor did he mention that letter thereafter.

The authorities holding that the arrangement is terminable at will are collected in Sections 2 and 3 of the Argument, infra.

Specification No. 2—Findings relating to estoppel.

Findings IV and V (Trans. pp. 38-39) are that at the time the oral agreement was made, Phillips advised that he would sell without substantial profit for about two years and that he would eventually abandon his bidding business and that, in performing, Phillips substantially abandoned his bidding business and did sell quantities of Hunt products without substantial profit. It will be noted that the Findings are *not* that Phillips was *required* to do either of these.

The finding that Phillips would sell "without substantial profit" is meaningless because there is no evidence of what a "substantial" profit is. Furthermore, there is no evidence of what profit appellees actually made on their Hunt sales nor of expenses. Detailed discussion of the insufficiency of evidence on profits is in the Appendix, Part II.

Some note should be made here of Phillips testimony that there was *no profit trouble for him* (Trans. p. 367).

Phillips was free to and did continue his bidding and brokerage business. During the first year, 1952, of the Hunt arrangement, Phillips did *over a quarter of a million dollars sales* for others in bidding and brokerage; a $253,175 volume in the bidding business

against $94,000 in Hunt sales (Trans. p. 360). In *addition* to this, he increased his profits as broker for others than Hunt, by 40%, from $2,773.43 in 1951 to $3,906.15 in 1952 (Trans. p. 361). He actually took on extra help for the brokerage work (Trans. p. 239). So his bidding business and his brokerage business constituted more than 75% of his total business for the year, leaving the Hunt account as virtually a sideline.

Furthermore, the evidence does not show any *need* to curtail appellees' other business. The new venture with Hunt only required infrequent visits to commissaries (Trans. p. 149), which were virtually within a small geographic triangle with the respective points at San Francisco, Sacramento and Monterey. Twenty-one commissaries were designated as those to which Phillips might resell Hunt products (Ex. AM) but, so far as the evidence shows, Phillips sold only to Alameda, Ord, Hamilton (few months), Camp Cook (two sales), and Lompoc (two sales).

Prior to asking for the Hunt business, Phillips had said the bidding business was falling off and he was seeking other types of business to fill the gap (Trans. p. 267). So far as the proof goes *that* was why the business *might* decrease. *There is no evidence that Phillips voluntarily cut down the business.*

Under the rules of law discussed in Sections 3 and 4 of the Argument of the Case, infra, these facts are insufficient as a basis for estoppel against Hunt.

Specification No. 3—Findings on performance and breach.

Findings VI and VII (Trans. pp. 39-40) find that Hunt breached the contract by terminating the arrangement and that Phillips had performed fully up to that time.

There is a total omission to find on either Phillips' inability to pay or on his repeated violations of every credit arrangement made with him during the period. The trial judge himself said (Trans. pp. 193-194) "that there was a failure (of appellees) to pay and money owing is apparently not in dispute." The evidence showing the default of Phillips is summarized in Part I of the appendix to this brief.

Specification No. 4—Findings relating to the nature and origin of damages.

Finding VIII is to the effect that as a result of selling without "substantial" gross profit, Phillips incurred substantial losses, in that his business credit was damaged and he was unable to renew his bidding business.

Damage to credit:

The striking fact of this whole case is that Phillips *never had the financial ability to perform!* The only capital Phillips had at time of termination was accounts receivable (Trans. p. 144). There is no evidence as to what capital, if any, the partnership had at the start of this operation. Mr. Church told Phillips he would be out of business if he did more than $5000 a month gross sales (Trans. p. 490) because of insufficient capital.

Causation:

There is no evidence that the *Hunt account* caused any loss of capital or credit. Other factors caused Phillips' condition, whatever the condition was. Thus, in February of 1953 a fire adversely affected Phillips' business and this affected the profits in his business (Trans. p. 233); an unauthorized withdrawal of $5000 by the partner, Liholm, left the partnership short of capital (Exhibits I, J, M); Phillips was also hampered by the bankruptcy of a larger creditor who owed him $4000 (Exhibits AK, AF).

In addition to these factors, in 1952, when arrearages on the Hunt purchases were mounting, Phillips paid out over $12,000 as a loan to the limited partner, Overseas Finance & Trading Co. (Trans. p. 237), at the rate of about $1000 a month (Trans. p. 389) the limited partner being then in tax trouble with the Federal government and paying off Federal tax liens. The loan was not repaid. *These* events caused whatever loss may have been suffered.

There is no proof of what loss Phillips suffered in the Hunt business—in fact appellee's counsel stated no effort would be made to prove the amount of any loss so suffered (Trans. p. 130). According to Mr. Willey, appellee's accountant, the Overseas Finance & Trading Co. (which Phillips asserted (Trans. p. 146) was his only source of credit), was unable to advance any funds to appellees because all its capital was tied up in a camera business (Trans. pp. 390-391), and, also, that company was struggling to pay off Federal tax liens on the installment plan (Trans. pp.

392-393). Obviously, this drying up of an alleged credit source was not caused by Hunt. It was due to the Overseas Company's business problems, with which Hunt was not concerned.

There is no evidence that Phillips requested credit from his limited partner or from a lending institution, *before or after* termination; hence no evidence of lack of credit.

Resumption of bidding business:

The evidence shows, (see summary under Specification 2 above), that Phillips did a tremendous bidding business while handling the Hunt arrangement. Phillips himself testified that immediately upon termination "we started to resume our bidding business and we also went into the brokerage business". (Trans. p. 144). He admitted that volume increased a few weeks after termination (Trans. p. 234), and between June 1953 and September 1954 he wrote often of the substantial volume he was doing after termination (Exhibits J, K, P, R, S, T, U, Y, AI, AK, AL). He even sent copies of large new contracts (Ex. R) and a summary of new accounts receivable (Ex. U).

Specification No. 5—Findings relative to Hunt's knowledge of the agreement.

Finding IX is to the effect that Hunt was informed of and consented to the Phillips' plan to sell at little profit for two years and discontinue his bidding business. As will be shown in the discussion of the "Equal Dignities" law, [Part 6 of the Argument], it was

incumbent upon Phillips to prove that an executive officer of Hunts actually had notice of the terms of the contract found by the Court to have been made.

The whole arrangement was made between Phillips and Flynn (Trans. p. 170), who was not an executive officer. Phillips had a conversation with Miller, the assistant sales manager, but details were not discussed (Trans. p. 107), and Miller, (who was not an executive officer), knew nothing of the details (Trans. pp. 445, 446). Flynn made no reports to superiors of what he arranged with Phillips (Trans. pp. 421, 424, 445-446).

The *only* time Phillips ever talked with an executive officer was *after* termination when he telephoned Mr. Erlanger, who had never heard of a contract with Phillips (Trans. p. 141).

Specification No. 6—Findings relating to basis for computing damages.

Finding X (Trans. p. 41) finds that a "reasonable computation" of damages is $21,500.

There is no foundation for any award of damages. Appellees' counsel has stated that the damages sought are based on a prospective profit (Trans. p. 120). In Part II of the Appendix we discuss in detail the insufficiency of the evidence to support any finding of damages. Suffice it to point out here that Phillips was authorized to resell to 21 commissaries (Exhibit AM), and he operated for 16 months, yet he proved only the amount of his sales at Alameda Air Base for

12 months (Trans. p. 295), four months at Fort Ord (Trans. p. 298), and four months at Hamilton Air Base (Trans. p. 300). These limited periods were selected because sales were "spotty" in other months (Trans. p. 300). Using these carefully selected figures, and making the additional but unwarranted assumption that (Trans. pp. 312-314) the same products would be sold at each commissary, Phillips then *estimates* his annual volume at the three bases, disdaining proof of the *actual* annual volume. He then assumes that others of the commissaries were "as big" as these (Trans. p. 314), and thus derives an estimated annual volume at other bases, again failing to prove his *actual* annual volume. He then invents a margin for the future of 20% gross profit (Trans. p. 317) without any foundation therefor.

Even with this pyramid of speculations, Phillips never produced evidence of his expenses of doing business as against his gross profit guess.

In order to make a proper finding on damages, the *Court would have to find:*

(a) that Phillips was entitled to unlimited credit to enable him to make the prospective sales on which loss of future profits is based;

(b) the amount of the prospective volume;

(c) the percentage of *net* profit that could be made by Phillips (gross less expenses);

(d) the length of the period the arrangement was to run.

The Court didn't so find; it couldn't.

Specification No. 7—The Court incorrectly applied the law.

Discussion of the law applicable to this case is found in the next succeeding section of this brief.

III.

CONCISE ARGUMENT OF THE CASE.

1. THE REASON FOR TERMINATION NEED NOT BE STATED TO THE OTHER PARTY.

The default of Phillips in his payments, his callous disregard of every payment plan, was a material breach, justifying termination. The trial judge made much of the fact that the default was not mentioned in the conversation at which Phillips was advised of the termination (Trans. p. 526).

It is not necessary that the cause for termination be stated to the other party. It is only necessary that there *be* a cause. Justice Brandeis, for the United States Supreme Court, summarized the rule in *College Point Boat Corp. v. U. S.* (1925) 267 U.S. 12, 45 Su. Ct. 199, 69 L. Ed. 490 (at page 493 of 69 L. Ed.):

> "A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at

the time, an adequate cause, although it did not become known to him until later."

See also:

Restatement, Contracts, Sec. 278;

Western Auto Supply v. Sullivan (C.C. 8, 1954) 210 F. (2d) 36.

That there was sufficient cause is demonstrated in the review of the evidence in Part I of the appendix.

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2. THE ARRANGEMENT WAS TERMINABLE AT WILL.

There are many gambles taken in commercial life. Here Phillips bought Hunt's products and resold them. Each *hoped* the arrangement would be mutually successful and would continue. This is true of *any* business arrangement. The trial Court felt that if parties *hope* that an arrangement will last for a period of time, they *thereby agree* to deal for a period of time (Trans. pp. 243-244). But the law is clear that a hope is not itself an agreement binding parties for a period of time; each is, nevertheless, free to stop dealing with the other. A mutual expectation of indefinite continuance of a relationship is customary but that does not abridge the right of either party to terminate. *Curtiss Candy v. Silberman,* (C.C. 6th, 1933) 45 F. (2d) 451 at 452. (See also *Ruinello v. Murray* (1951) 36 Cal. (2d) 687, 227 Pac. (2d) 251).

Contrary to the view expressed by the trial Court (Trans. p. 529) the mere fact that the parties did busi-

ness together for more than a year does not raise any inference that they had actually contracted to be bound to each other for that or any other period. A persuasive line of cases supports this contention: *Willard Southland & Co. v. United States* (1922) 262 U.S. 489, 67 L. Ed. 1086; *Curtiss Candy Co. v. Silberman* (6th Circuit) 45 F. (2d) 451; *Jordan v. Buick Motor Co.* (7th Circuit) 75 F. (2d) 447; *William C. Atwater & Co. v. United States* (1922) 262 U.S. 495, 67 L. Ed. 1089); *Fitzgerald v. First National Bank* (8th Cir., 1902) 114 Fed. 474 and others. All of these cases concern manufacturer and dealership agreements, some written and some oral, and they hold that the arrangement is terminable at will.

The Fourth Circuit summarized the rationale of the decisions in *Ford Motor Co. v. Kirkmyer Motor Co.* (1933) 65 F. (2d) 1001 at 1003:

> "This contract was not one of sale, or of hiring, or of agency. Viewed in the light most favorable to plaintiff, it was nothing more than a conditional contract to sell goods to plaintiff in the future upon the terms and prices at which sales were made to other dealers, but without specifying the amount of goods to be sold or purchased."
>
> . . . . . .
>
> "It merely furnishes a basis upon which dealings are to be conducted; and, while it is a binding contract to the extent that it is performed, it imposes no obligation on defendant to sell or on the dealer to buy and furnishes no basis for recovery of damages if defendant refuses to sell."

3. LACK OF MUTUALITY MAKES THE CONTRACT TERMINABLE AT WILL.

The mutuality and enforceability of a contract depends upon whether or not both parties are bound by the agreement and whether there is sufficient certainty as to quantity so that it is feasible to ascertain the amount of the commodity intended as the subject of the arrangement.

In this case, the lack of mutuality is demonstrated principally, but not exclusively, by two separate facts: *First,* Phillips was entitled to and did freely engage in his brokerage as well as his bidding business; *second,* Hunt couldn't force Phillips to buy as much as one can of goods.

(a) Phillips right to concentrate on other business.

Hoffman v. Pfingsten (Wis. 1951), 50 N.W. (2d) 369, 260 Wis. 160, 26 A.L.R. (2d) 1132, is startlingly similar to this case. The plaintiff was the exclusive distributor of the defendant's products. The original contract obliged plaintiff to take 25,000 bottles of defendant's shoe dressing monthly, but this was modified and that requirement was completely eliminated (Phillips had no quota to meet). It was held that the contract as modified lacked mutuality. The Court pointed out that this is *particularly so* where a plaintiff has no obligation to give all his time to the defendant's products, but is permitted by the contract to engage in other business (as Phillips was, and did). *Friedman v. McKay Leather Co.* (1919) 179 Cal. 566, 178 Pac. 139, at page 568 of the official report:

"As the appellants did not agree to give all or any definite portion of their time to respondent's business, it was wholly optional with them whether or not they would endeavor to secure orders for respondent.

(b) Phillips could not be forced to buy from Hunt.

The Eighth Circuit in *E. I. Du Pont De Nemours & Co. v. Claiborne* (1933) 64 F. (2d) 224, had before it a case very similar to the instant case (except that in that case, unlike this one, the dealer had spent six years building up the market for the products and had invested large sums in the business). The issue as stated by the Court (page 227):

"Reduced to its lowest terms, the claim of the Reno Company is that what it bargained for and received from the Du Pont Company was an agreement that it should be the sole distributor of Duco in the State of Iowa so long as the Du Pont Company was satisfied with its services and so long as it (the Reno Company) chose to perform the services; that the consideration for the promise on the part of the Du Pont Company was the promise of the Reno Company to act as sole distributor and to do the things which it was required to do under the agreement, and the performance of that promise."

(This is virtually a summary of Finding I, Trans. p. 38.)

The Court held that the defendant could terminate such an exclusive contract at any time for lack of mutuality:

. . . . . .

> "The contract itself provides that the consideration for the services of the Reno Company is the discount of 25 per cent, upon all materials ordered from the Du Pont Company. The agreement was nothing more than a sales agency agreement, terminable at will by the Reno Company, but containing a promise of the Du Pont Company to continue so long as satisfied with the services of its distributor." (Pages 228, 229).
>
> . . . . . .
>
> "Our conclusion, therefore, is that, whether the termination by the Du Pont Company was in good faith or bad faith, no action for damages could be based upon it." (P. 233).

See also: *Velie Motor Co. v. Kopmeier* (C.C. 7th, 1912), 194 F. 324; *Oakland Motor Co. v. Indiana Auto. Co.* (C.C. 7th, 1912), 201 F. 499; *Woerhide v. Barber Asp. Pav. Co.* (C.C. 8th, 1918), 251 F. 196; *Huffman v. Paige-Detroit Motor Co.* (C.C. 8th, 1919), 262 F. 116.

(c) An agreement to "promote the sales" is not sufficient consideration for a promise to keep Phillips as a jobber for an unspecified period of time.

In *Leach v. Kentucky Coal Company* (1919), 256 Fed. 686, the plaintiff was to sell and distribute "as much as possible" of defendant's products for five years in a particular territory. The Court held that there was a lack of mutuality:

> "There is no obligation whatever upon plaintiff to order any coal. If plaintiff had refused or neglected to order coal, defendant would not have any cause of action against him."

Similarly: *Jackson v. Alpha Cement Co.* (1907), 106 NYS 1052.

The last two cases mentioned were followed by the California Court in *Scott v. Cline Electric Manufacturing Company* (1930), 104 Cal. App. 122 at 126; 785 Pac. 349 at 351.

Accord: *Hancock Oil Co. v. McClellon* (1955), 135 Cal. App. (2d) 667; 288 Pac. (2d) 39; *Lawrence Block Co. v. Polston* (1954), 123 Cal. App. (2d) 300 at 308; 266 Pac. (2d) 856; *J. A. Folger Co. v. Williamson* (1954), 129 Cal. App. (2d) 184 at 187; 276 Pac. (2d) 645.

(d) Phillips engaging in a new business.

A recent annotation in 26 *ALR* (2d) 1139 at 1141 points out that in determining whether the approximate quantity involved is sufficiently ascertainable, the Courts hold that if the business is a *new type of business* when the contract is made, the contract is uncertain and unenforceable because there is no criterion to determine the amount that would be needed. Here *Phillips admits* that the jobber arrangement was new to appellees and drastically different from his prior business (Trans. p. 168 and see p. 97).

(e) Part performance does not supply mutuality.

The trial Court on many occasions showed it was impressed by Phillips' testimony that he had doubled sales of Hunt's products to commissaries. This does not affect the mutuality question. In *A. Santaella & Co. v. Lange Co.* (C.C. 8th), 155 F. 719 at 725, in-

volving an exclusive sales representative in a designated territory, the Court said that counsel had been

> "placing much stress upon the contention that the testimony of Mr. Lange tended to show that a part of his undertaking under the arrangement between the parties was that he should, by his experience and labor, extend the field for the sale of the cigars to be furnished by the plaintiff in error, thereby creating a larger market for them, and that he performed in this respect his undertaking. *Let it be so conceded. But how does this obviate the stubborn fact that whether or not he would maintain that field and demand, occupy or abandon it, or cease, ad libitum, to send in any orders, or betake himself to some other field of operation and employment, where wholly optional on the part of the defendant in error?* The plaintiff in error, on such election by its purchaser, was without remedy." (Emphasis added)

Accord. *Victor Talking Machine v. Lacher* (Minn. 1915), 150 N.W. 790.

(f) Exclusive dealership does not cure lack of mutuality.

Phillips was not an "exclusive" dealer to the extent of being prevented from engaging in other business.

Phillips would distinguish the cases on the ground that he had an "exclusive" (Trans. p. 199). Many of the cases above cited involved "exclusives". As was said in *Curtiss Candy Co. v. Silberman* (C.C. 6th, 1930), 45 Fed. (2d) 451 at page 453:

> "On the other hand, the normal inference is that the parties intended the restrictive promise of defendant, to sell to no others in Hamilton

county, to be operative only for that period during which plaintiffs continued to represent defendant; in other words, that the grant of exclusive territory was dependent upon and related to the performance of the marketing agreement and was coextensive in term with it—*that it was, as was the marketing agreement, revocable or terminable at will.*" (Emphasis added)

An exclusive representative contract, even where the product is new and requires the representative to install expensive show rooms or warehouses and do much advertising (which Phillips was *not* required to do), is terminable at will where one or both parties has an unrestricted right to refuse to perform (*Royal v. Chicago Streamlite Co.* (7th Circuit 1950), 178 F. (2d) 81).

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4. THE STATUTE OF FRAUDS IS A DEFENSE AND ESTOPPEL IS NOT APPLICABLE.

Appellant pleaded the Statute of Frauds (Trans. p. 24), and also moved, unsuccessfully, for dismissal prior to trial on the same ground (Trans. pp. 33-35). The California Civil Code, Section 1624(1) requires that a contract which is to last for more than a year shall be in writing. The trial Court held that the oral contract was to continue for more than one year but that appellant is estopped to rely on the Statute.

The doctrine of estoppel never operates to destroy the salutary rules embodied in the Statute of Frauds (*Stepp v. Williams,* 52 Cal. App. 237, 198 Pac. 661). The Statute is designed to protect a defendant in a

situation like the instant one wherein the plaintiff's claim is based on a conversation with a dead man.

Estoppel is not favored by the law (23 *Cal. Jur.* (2d) p. 421); it is applied only where the plaintiff suffers an "unconscionable hardship" in performing, which defendant caused by action or inaction. "Unconscionable" means monstrously harsh and shocking to the conscience (Cf. *Domas Realty Co. v. 3440 Realty Co.* (1943), 40 N.Y.S. (2d) 69 at 73, 179 Misc. 749).

In order to warrant the application of the doctrine two basic elements must be found—(a) Acts or representations of the other party which are tantamount to fraud, (b) causing unconscionable hardship.

The trial Court's finding as to the representation element is two-fold: that Phillips said he intended (1) to sell at small profit for a while, and (2) to curtail his other business so that he could work the Hunt account. On the hardship element, it was found that Phillips did so operate with the result that, at time of termination, his credit was impaired and he was unable to resume his bidding business.

The representation element:

It is important to note that Phillips was *not required by the agreement* to follow through on either of his "intentions". Under the contract, as pleaded and found by the Court, Phillips was entitled to fix his own sales price and he was entitled to and did devote all the time he wished in his business for other customers. Therefore, assuming for the moment that there was a detrimental change of position, never-

theless it would not be sufficient to raise an estoppel because the change of position was not required by the contract or implicit in the performance. (23 *Cal. Jur.* (2d) p. 423; *Schick Service v. Jones* (C.C. 9th, 1949), 173 Fed. (2d) 969.

The evidence bearing on the two representations is discussed under the second specification of error above. The import of the first part of the finding is that appellees made *some* but *might have made more* profit. Estoppel is never intended to work a gain to a party (*Palmer v. Phillips* (1954), 123 Cal. App. (2d) 291, 266 Pac. (2d) 850). The loss of a chance for greater profits is never a ground for estoppel, otherwise estoppel would be "an instrument of gain or profit while its object is protective and limited to saving harmless or making whole the person in whose favor it arises" (*Little v. Union Oil Co.* (1925), 73 Cal. App. 612, at 620-621, 283 Pac. 1066 at 1069).

In *Morrison v. Land* (1951), 169 Cal. 580, 147 Pac. 259, it was held that plaintiffs' refusal of other offers of employment at higher compensation (relying on defendant's promise) was not sufficient to raise an estoppel.

There are numerous California cases in which a plaintiff, suing on an oral contract, unsuccessfully relied on estoppel based on loss of anticipated benefits. See cases summarized in *Palmer v. Phillips* (1954), 123 Cal. App. (2d) 291, 266 Pac. (2d) 850.

The intention of Phillips to abandon his bidding business is no basis for estoppel because, as shown above, he *didn't* abandon that business; rather, it con-

stituted 75% of his business, his Hunt account being a relatively minor item.

On the Hardship Question:

As seen in the discussion of facts relative to Phillips' credit situation, under the 4th Specification of error, if there was any credit impairment, there is no evidence that this was *caused* by the Hunt sales, but on the contrary the numerous other adversities were the proximate cause.

The fact that Phillips didn't pay Hunt on time does not by itself establish lack of credit nor that he was unable to pay. It only shows that he did not pay—it doesn't show *why* he didn't pay.

The parties didn't contemplate possible impairment of credit, therefore if such resulted, it is not a ground for estoppel (*Little v. Union Oil Co.* (1925), 73 Cal. App. 612 at 620, next to last paragraph; 238 Pac. 1066 at 1069).

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5. ANY TERM, INDEFINITE OR NOT, WHICH IS FOR MORE THAN A YEAR IS WITHIN THE STATUTE.

The trial judge stated that because the parties did business for 16 months, they had contracted for an indefinite but longer period than that (Trans. p. 529).

But if the contract was for an indefinite period and such period exceeds a year, then by definition the agreement is barred by the Statute of Frauds. *The Ninth Circuit has so held.*

In *Fibreboard Products v. Townsend* (C.C.A. 9th, 1953), 202 Fed. (2d) 180, the plaintiff quit a job, sold

his household goods at a sacrifice and moved to California with his family upon defendant's promise of permanent employment. District Judge Harrison held that the defendant was estopped to assert the Statute of Frauds and also held that the particular contract for permanent employment should continue for two years but was not within the Statute. *Circuit Judges Pope and Healy agreed that estoppel was there present but held that a contract for a reasonable time is within the Statute if the reasonable time is more than one year:*

> "I have difficulty in reasoning how this can be in fact a contract for employment for a period of two years and yet not come within the provisions of the California Statute of Frauds relating to contracts not to be performed within a year." (Page 183.)
>
> . . . . . .
>
> "that since the contract from Fibreboard to Townsend was in truth and in fact a contract for employment for two years, the impact of the Statute of Frauds upon it would be precisely the same as upon any other contract for employment for a fixed period in excess of one year." (Page 184.)

No matter what theorizing is done, if the end result is a contract that was to last for more than a year, it is within the Statute of Frauds.

The contract is made by the parties when they contract—a new contract cannot be made by a sympathetic Court after termination. In the *Du Pont v. Claiborne* case, from which we have quoted at length above, the Eighth Circuit said:

"We have much sympathy with the theory upon which the case was disposed of in the court below. It seems fair that, after having spent six years in developing the territory assigned to it, the Reno Company should have been permitted to continue or should have been compensated for the injury done it by having its business taken away. However, the injury done to the Reno Company was one against which its contract, rather obviously, did not afford protection." (Page 233.)

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6. NO ONE HAD AUTHORITY TO BIND HUNT FOR MORE THAN ONE YEAR.

California Civil Code Section 2309 requires that the authority of Mr. Flynn, the Hayward sales manager, to make such a contract as that found by the District Court must be evidenced by a writing. Since the contract, as found, was to last for more than a year, it must be in writing (C.C. 1624(1)) and the authority of the Hunt employee to enter into such a contract must also be in writing under Section 2309 of the same Code unless the employee is an executive officer. This rule is generally known as the "Equal Dignities" Rule.

There is no evidence that Hunt's employee, Flynn (or Miller) had any written authority to enter into a contract which would continue for more than one year. (See summary of evidence under Specification No. 5 above.) Neither Flynn nor Miller were executive officers. A jobber arrangement was unique with Hunt (Trans. p. 446).

Both the Ninth Circuit and the California Court have rendered decisions which control on this point.

The Ninth Circuit decision is *Ekwood Lumber Co. v. Moore Well & Lumber Co.* (1938), 97 Fed. (2d) 402. This was a suit for damages for breach of alleged contract for sale of substantial amounts of lumber, which contract was required by the Statute of Frauds to be in writing. The alleged contract was a letter written by one who was the sales agent of the defendant corporation in obtaining orders for lumber in a specified area (like Flynn and Miller of Hunt Foods). The Court held that, the defense of the Statute of Frauds having been raised, the burden was on plaintiff to prove written authority of the agent to enter into the contract and that plaintiff had failed in his proof. The Court said, referring to the defendant as appellee, (page 409):

> "Assuming, . . . that it was represented that the authority of Carl R. Moore . . . included the making of contracts of sale, there is no evidence that such representations went to the extent of allowing for an assumption that the agent had authority to enter into contracts required to be in writing. . . . *Appellee could in no way be estopped to assert the defense of California Civil Code, sec. 2309, unless it represented that its agent was authorized to enter into contracts required to be in writing.*" (Emphasis added.)

Followed in *Jeppi v. Brockman Holding Co.* (1949), 34 Cal. (2d) 11 at 17; 206 Pac. (2d) 847.

In *Anderson v. Standard Lumber Co.* (1923), 64 Cal. App. 410, 1 Pac. 495, the defendant corporation's

agent was authorized to hire designated types of employees at specified wages. The agent exceeded his actual authority by hiring the plaintiff (who was not within the authorized categories of employees) and by agreeing to pay plaintiff a salary in excess of that authorized. The plaintiff was later discharged and sued to recover the salary stated in his contract made with the agent of the corporation. The Court held that plaintiff could not hold the corporation to the alleged contract since it was made by the agent without authority; that *the corporation officers had no knowledge of the alleged terms of the contract, even though they did know that the plaintiff had been employed,* and the corporate officers had made no representations to the plaintiff that the agent had any such authority.

Cited in:

Mortgage Guarantee Co. v. Chotiner (1936), 8 Cal (2d) 110 at 113; 64 P. (2d) 138 at 140.

The California Supreme Court has ruled that where a plaintiff claims that a ten year contract was made by an agent (exactly as Phillips did here) the contract must be in writing and the written authority of the agent must be proved.

> "It is claimed by the appellants that the record contains no evidence showing any authority on the part of either Charles L. Fair or Hermann Oelrichs to bind Mrs. Oelrichs and Mrs. Vanderbilt by any such contract as found by the Court. We think this contention is sound and must be sustained."
>
> (*Seymour v. Oelrichs* (1909) 156 Cal. 782 at 788.)

The case just cited also held that knowledge by a principal of *a* contract with the plaintiff does not justify any inference of ratification of or notice of a contract required to be in writing. Thus, if we assume the officers of Hunt Foods knew Phillips was buying and selling their products to commissaries, exclusively or otherwise, *there is no inference of notice of or of ratification of any agreement which wasn't terminable at will.*

> "Even though they (the principals) had knowledge that he had made a contract of employment with Seymour on their behalf, their duty to inquire into the terms of such contract did not impute to them notice that he had exceeded his authority and undertaken to bind them by an agreement required to be in writing." (P. 791 of official reports; p. 92 Pac. reports.)

It is the rule in California that in order to rely upon any ostensible authority, the plaintiff must produce evidence of similar transactions in which the act of the agent was authorized or recognized; he must show at least one specific instance in which a similar act of the agent was authorized or recognized, 2 Cal. Jur. (2d) p. 700, citing cases (*Dunlap v. Dean* (1930) 109 Cal. App. 300 at 307, 292 Pac. 991 at 994). It is admitted that the particular arrangement claimed by Phillips was "unique" for Hunt Foods (Trans. p. 446), so no prior *custom* existed.

Here the most that can be said is that the corporate officers knew that Hunt products were being sold to Phillips. There is no proof of knowledge by an of-

ficer of Hunt of any arrangement that was to endure or could be required to endure for *any* period of time. Phillips has not met his burden of proof.

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7. PROSPECTIVE DAMAGES NOT AWARDED TO A NEW ENTERPRISE.

Phillips testified that this was a new type of business for the partnership; that this was "a drastic change for us from one kind of business to another" (Trans. p. 168); even the items sold were different (Trans. p. 97). In fact the business was so new he had not even started to sell at some of the commissaries and at others he was just getting some items in at time of termination (Trans. pp. 127-128). Even the partnership itself was new, having merely one year's operation in the other type of business (Trans. p. 171).

It is well established that no prospective profits may be recovered when the alleged breach occurs in connection with a new venture which is interpreted by the defendant. 25 *C.J.S.* 519.

California Press Mfg. Co. v. Stafford Packing Co. (1923) 192 Cal. 479, 221 Pac. 345. The trial Court awarded damages for loss of prospective profits but the Supreme Court reversed, saying (p. 485):

> "Where a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation."

See also:

Gibson v. Hercules Mfg. & Sales Co. (1927) 80 Cal. App. 689, 252 Pac. 780;

Hartley v. Weller (1951) 104 Cal. App. (2d) 118, 231 Pac. (2d) 133.

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8. THERE IS NO EVIDENCE TO SUPPORT A DAMAGE AWARD TO PHILLIPS.

The findings do not indicate how the Court arrived at $21,500 as the amount of prospective damages suffered by appellee.

(a) The best possible proof must be given.

Because any estimate of future profits is speculative, it is necessary that the best available proof be adduced (*Allen v. Gardner* (1954) 126 Cal. App. (2d) 335 at 342, 272 Pac. (2d) 99) (See *Sedgwick, Damages,* 9th Ed., Sec. 171). Usually the proof consists of showing the actual receipts and expenses during the period of operation and, where possible, the sales made in the plaintiff's territory after the termination (*Restatement Contracts,* Sec. 331, comments c and e). Appellee did *neither,* although both figures were available. There is no evidence of the sales and expenses while handling the Hunt account. The summary of the evidence is set forth in Part II of the appendix.

(b) Guesses and conjectures are not sufficient.

The comment on the evidence in Part II of the appendix shows that Phillips substituted speculation

as to the annual volume done by him at three of the 21 bases, rather than proving the actual volume, then estimates his volume at the other commissaries, invents a margin of gross profit for the year after termination, followed by an imaginary rate of increase.

Prospective damages must be proved just as any other damages are proved and that burden is on the plaintiffs; *Austin v. Roberts* (1933) 130 Cal. App. 328 at 333, 20 P. (2d) 97 at 99.

This bit of prophetic vision—or myopia—is not evidence on which an award for damages may be given (*Caspary v. Moore* (1937) 21 Cal. App. (2d) 694 at 699, 70 Pac. (2d) 224).

In *Stephany v. Hunt Brothers* (1923) 62 Cal. App. 638 at 643, the plaintiff was an exclusive sales agent who sued for damages for the premature termination of his contract. By a system of multiplication based on estimates of what sales he could have made, he endeavored to show the probable volume of business that might have been secured but for defendant's breach. The Court held that this type of evidence was *not a basis for an award of prospective damages.* See also: *Friedman v. McKay Leather Goods* (1919) 179 Cal. 566, 178 Pac. 139; *Baumer v. Franklin Co. Distilling Co.* (C.C. 6th, 1943) 135 Fed. (2d) 384; *Parke v. Frank* (1888) 75 Cal. 364, 17 Pac. 427.

Schmitt v. Continental-Diamond Fibre Co. (C.C. 7th, 1940) 116 Fed. (2d) 779, is strikingly similar. The plaintiff there, also an exclusive sales agent, unsuccessfully introduced the same type of evidence as that

relied upon by Phillips in the case at bar. The Circuit Court summarizes the theory of that plaintiff, referring to him as appellant (page 784):

> "Appellant, of course, admits that he lost money on his contract during the year 1931, and the first five months of 1932, until its termination. Nevertheless, he contends that it was still a valuable contract to him for the reason that he was then in a position to reduce his expenses substantially and still keep up his volume of sales—that up until that time he had been spending a great deal in building up his territory . . ."
>
> . . . . . .
>
> "Appellant assumes that a certain percentage of this business would have originated in his district, the precentage increasing from 28% in 1932 to 31% in 1934 and 1935—a wholly arbitrary figure so far as we are able to ascertain. Such percentage of business would have yielded him certain gross commissions, from the amount of which he subtracts expenses not exceeding $35,000 a year, leaving a total of $163,095 for the years 1932 to 1935, inclusive."
>
> . . . . . .
>
> "The District Court was justified in disregarding such testimony as proof of appellant's damages, and, in the absence of any better evidence, in holding that appellant had not proved his claim for damages, conceding for the moment that he had proved breach of the contract."

(c) Contingent future bargains rendered damages uncertain.

Where future profits are dependent on collateral agreements, or contingent on future bargains or states of the market, they are too uncertain.

The evidence, summarized in Part II of the Appendix hereto, shows that the conditions in the commissaries are not constant; that there are frequent changes in volume at the individual commissaries; that a profit is dependent on the particular "condition" you are in at a particular commissary; that purchases are at the discretion of individual officers, that Phillips' estimates of future sales was based on what some officer hoped to order (but hadn't) in the future.

Such uncertainty precludes a damage award (*Sedgwick, 9th, Damages,* p. 9378, Sec. 197; *McGregor v. Wright* (1931) 117 Cal. App. 186 at 197—leadnote 6, 3 Pac. (2d) 624). See also 15 *Amer. Jur.* p. 557.

(d) Phillips' dilemma.

Appellee's case is based on what profits Phillips thinks he might have made after termination. Yet, when arguing for an estoppel against the statute of frauds, Phillips asserts the Hunt business was handled at a loss. If he did operate at a loss, then an estimate as to profits he might have made has no probative force. *Lewis-Hale Co. v. Enterprise Fuel Co.* (4th Cir. 1929) 33 Fed. (2d) 727 at 730:

> "Bearing in mind that during most of the time the Washington office had been conducted at a substantial loss, and at no time at a profit, we do not attribute probative force to the opinion of the agent's Washington manager as to the sales which would have been made had the agency continued."

(e) Fatal lack of proof of Phillips' expense of doing business.

There is not a scintilla of evidence—not even a guess—as to what Phillips' travel expense, sales expense, billing or overhead amounted to at any time. His collection of guesses are all as to *gross* profit, but *he failed completely to introduce any evidence of his expense of doing business.*

Skuper v. Imperial Irrig. Dist. (1939) 33 Cal. App. (2d) 392, 91 Pac. (2d) 910, the plaintiff proved his income before and after the event but did not offer evidence of his *expense* of doing business. The Court held that this failure of proof on the part of plaintiff prevented any award for lost profits.

15 *Amer. Juris.,* page 574:

"Proof of the gross receipts of the business standing alone, however, is not sufficient."

Similarly:

Ellerson v. Grove (C.C. 4th, 1930) 44 Fed. (2d) 493 at 499;

Fireside Marshmallow Co. v. Quinlan (C.C. 8th, 1954) 213 F. (2d) 16.

In *Central Coal & Coke Co. v. Hartman* (C.C. 8th), 111 Fed. 96, the plaintiff testified to his ordinary profit on the merchandise based on his purchase cost and his sale price. The Circuit Court held this was *not* enough—the expense of operating is an essential part of the proof.

Alexanders Dept. Stores, Inc. v. Ohrbach, Inc. (1945), 56 N.Y.S. (2d) 173 at 182, 269 A.D. 321. Plaintiff, a general department store, sued defendant

manufacturer for refusing to sell it a brand name line of clothes. The plaintiff proved (1) the actual volume of sales for two years before he was cut off and one year afterward (2) the increase in volume in the second year over the first year and the further increase in the third year (3) the cost price, the sale price and the mark-up. An accountant who had done plaintiff's work for many years estimated the costs, overhead expenses and profits in the particular department in this store, and computed the per cent these items were of the selling price. Held: For the defendant.

> "With nothing before the court to indicate even approximately what the deductible expenses were or how they were calculated and no standard of comparison between the net profits earned before the discrimination and those earned during the period, the proof is insufficient to sustain the damages found."

(f) No proof of profits or losses after termination was introduced.

A plaintiff must not only prove what his expenses were and what expenses in the future are anticipated, but he must show what profits he made in his other business since termination (1953, 1954 and 1955), earnings which the time and facilities of his office, left free by the absence of Hunt account, enabled him to make from other clients. (*Palmer v. N. Y. Herald* (1929), 239 N.Y.S. 619; *Rapidol v. Howe* (Wash. 1927), 258 Pac. 469).

(g) No proof of ability to perform.

The evidence set forth in Part I of the appendix shows that at time of termination Phillips' only capital was accounts receivable (Trans. p. 144) which he had previously assigned to Hunt (Ex. E) and he owed Hunt some $25,000 (Trans. p. 218) which was long overdue (p. 9 of Ex. AP).

There is no evidence that Hunt ever agreed to finance appellee's business, nor that Church or any one else would have authority to agree to finance the business. Hunt Foods, Inc. is not in the banking business.

Even if we assume, without basis therefor, that Hunt voluntarily did finance plaintiff up to time of termination, that would not constitute an agreement to extend any credit for the future.

Proof of the ability of the appellee partnership to pay for and receive the Hunt merchandise was essential in order to establish that damages resulted from any supposed breach. (*Watson v. Oregon Moline Plow Co.* (Ore. 1924), 227 Pac. 278 at 285), 112 Ore. 414.

A party to a contract cannot insist upon damages for nonperformance by the other unless he proves his ability to perform thereafter (12 *Am. Jur.* 889).

The California rule is succinctly stated in:

McDorman v. Moody (1942), 50 Cal. App. (2d) 136 at 141, 122 Pac. (2d) 639 at 642.

> "It is a general rule that one who cannot perform his part of a contract is not entitled to per-

formance on the part of his contractee. (17 C.J.S 934.) Notwithstanding that if a vendee under a sales agreement notifies the vendor before the latter is in default that the vendee will not perform, . . . *yet upon the trial there must be proof of the vendor's ability to perform all of his covenants.*" (Italics ours.)

It was clearly established that Phillips could not finance the jobber operation. He testified (Trans. p. 131) that as business increased the more he owed Hunt and that he never had funds with which to pay Hunt faster (p. 512). He could not have continued after termination unless Hunt became a banker for him and this Hunt was neither obligated nor disposed to do.

CONCLUSION.

Phillips was never obliged to purchase any Hunt products. He had no obligation to establish a warehouse or to advertise. He was entitled to, and did, devote as much time as he desired to his bidding and brokerage business. Since Hunt could not compel Phillips to do anything, there is a complete lack of mutuality.

If the oral contract was to endure for more than a year it is within the Statute of Frauds. The only grounds for estoppel against this plea, as found by the Court are that, at the time of contracting, Phillips said he *intended* to sell at a small profit for a year or so and that he *expected* he would have to abandon

his other business. He did *not oblige* himself to do either.

A small profit is nevertheless *a* profit, and loss of greater profits is not a ground for estoppel, otherwise the doctrine would be applied as "a sword instead of a shield." Further, there is no evidence of what profit—large or small—Phillips actually made on his Hunt operation.

Phillips may have expected to abandon his other work but he did not do so—in fact his other business constituted 75% of his volume during the Hunt period.

The only finding of hardship is that Phillips' credit was not good at the time of termination but there is no showing what credit he ever had, nor what caused his poor credit. His only alleged source of credit was his limited partner, and that partner was unable to help, *not because of Hunt,* but because of the limited partner's own business practices and tax difficulties.

The evidence shows that no executive officer of Hunt knew of such a contract as that found by the Court, a contract which would be unique with Hunt. Knowledge that Phillips was buying from Hunt is not knowledge of the terms of an unusual contract.

Whether or not termination was justified is immaterial because of the lack of mutuality and the application of the Statute of Frauds. Nevertheless, there was ample justification for termination in the material breach by Phillips, his refusal to pay on time

and his lending to his limited partner monies that were long overdue to Hunt and which, under the assignment of Receivables, were Hunt funds held by Phillips as a constructive trustee. This latter defection is a cause for termination, even if it was not known to Hunt.

In endeavoring to show damage, Phillips failed to produce the best evidence available and relied on rank speculation. The burden of introducing all facts available applies to a plaintiff seeking prospective damages to the same extent as in an ordinary damage action.

Hunt is entitled to judgment for the $11,495.16 principal due, plus interest from the maturity dates of the respective trade acceptances and reasonable attorneys fees.

Dated, San Francisco, California,
November 14, 1956.

CUSHING, CUSHING, DUNIWAY & GORRILL,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

PART I.

SUMMARY OF EVIDENCE ESTABLISHING THE DEFAULT OF APPELLEES JUSTIFYING TERMINATION.

The terms of payment were arranged just prior to December 1951 between Phillips and a Mr. Church, of the credit department of Hunt (Trans. p. 469). At this time Phillips submitted a year-old statement of the partnership covering a three-month period (Trans. p. 179). Mr. Church testified that Phillips was to pay 10 days after delivery of merchandise (Trans. p. 470). Phillips testified that all invoices were marked "payable in 10 days" (Trans. p. 178). Mr. Church explained that in the canning industry the words "net 10 days" on an invoice means the buyer can take a discount if he pays within 10 days but that the invoice is delinquent after the 10th day; that this stemmed from the earlier practice in the canning industry of doing business on sight draft allowing 10 days in which to pay the draft and earn a discount (Trans. p. 488). Exhibit AP which is a correlation of invoices and dates of payment thereof, shows that shortly after he started selling Hunt products he failed to pay when due and thereafter was regularly delinquent. Phillips asked for an additional week over the 10 days (Ex. A), but Mr. Church insisted on payment within 10 days (Ex. C) and complained that Phillips had failed to fulfill his promise to submit current financial information in substitution for the year-old profit and loss statement which

covered only a three-month period (Exhibits B & C). There was no statement submitted until May of 1952 (Trans. p. 482).

The debt was mounting rapidly (Exhibit AN) and Phillips proposed (Ex. D) an assignment of Accounts Receivable, for the protection of Hunt (Trans. p. 188) which was executed May 12, 1952 (Ex. E).

This assignment (Ex. E), assigned to Hunt certain specified receivables and *all future* receivables.

> "and *all* amounts which may become due and owing to Wellington Phillips & Co., a partnership, *in the future* arising out of the sale . . . to (specifying 17 commissaries)".

Phillips says he never paid any attention to this assignment (Trans. p. 138). Phillips in his correspondence said the commissaries were paying him 3 to 4 weeks after he billed them (Exhibits F and G), and on his direct testimony he raised it to 5 weeks (Trans. p. 131), yet by August he was running behind as much as 3 months on payments to Hunt (pages 5 and 6 of Exhibit AP). His indebtedness mounted and remained large. It was around $18,000 when the assignment was executed, over $24,000 at the end of the year and a high of over $29,000 in the middle of April, 1953.

At the time of termination appellees owed appellant $28,813.19 and were then as much as five months overdue in payment for goods purchased from Hunt (Page 9 of Exhibit AP). For example, page 9 of this exhibit shows the payment on April 17, 1953, which

was the last payment he made before termination, included shipments to him on December 19, 1952 (4 months); his payment on March 24, 1953, included deliveries on October 16, 1952 (5 months); page 8 of this exhibit shows his payment on February 17, 1953, included items shipped on October 6, 1952 (4½ months). Yet Phillips testified (Trans. p. 131) that the payments from the government averaged 30 days from his billing date, which would be a week ahead of Hunt's invoices. Under the assignment these monies belonged to Hunt as received by Phillips. He was a trustee for Hunt and was, therefore, using Hunt's money to finance his personal needs and was withholding Hunt monies for approximately 4 to 5 months after he was paid.

In the face of these facts, there is no justification for Findings VI and VII.

PART II.

SUMMARY OF THE EVIDENCE RELATING TO PROSPECTIVE DAMAGES.

(a) ACTUAL VOLUME NOT SHOWN.

Appellees were permitted to resell to 21 commissaries (Exhibit AM). They operated for sixteen months.

Here is a short summary of a *few* of the available facts that appellee *failed* to prove:

(1) The actual volume of sales and amounts of profit at the 21 commissaries.

(2) The volume and the profit at Alameda Air Base in the four months after *December,* 1952 (he showed only the first 12 months).

(3) The actual volume of sales at Fort Ord for the full 16 months. (Phillips put into evidence the sales for *only the last 4 months* he was to sell at that commissary.)

(4) The actual volume at Hamilton for the full time. (He picked only the last four months because, in other months the sales were "spotty".)

(5) The amount of his expenses of doing business (travel, billing, overhead).

(6) Whether he lost or made profit in his quarter of a million sales of products of others or in his brokerage.

The following is an outline of the assumptions Phillips uses for "evidence" of sales done in connection with the subject of damages:

First assumption: He estimates the annual volume of sales at three of the 21 commissaries when he had available the actual figures. He took a selected 12 months at Alameda Air Base, 4 months at Ford Ord and four months at Hamilton Field, and endeavors to translate these into an annual volume. Thus, he takes sales for four "good" months at Fort Ord and multiplies this by three to get an estimate of what he did in a twelve-month period at that base. A guess is thereby submitted in lieu of the actual volume at

that commissary. He does the same for Hamilton Field Air Base. Phillips picked the particular four months at Ford Ord because that was the only period wherein sales were "consistent" (Trans. p. 300). He selected a different four months at Hamilton Field because the rest of the time the sales were "spotty" (Trans. p. 299). In this manner appellees derive an assumed annual volume at these three bases, ignoring the actual annual volume.

Second assumption: On the speculations as to what the annual volume might have been at the three particular commissaries, Phillips makes some further assumptions. They assume that Fort Ord's volume was seven times that of Alameda, without, of course, any evidence to support the estimate. Then he imagines that the Presidio, Mare Island, Mather Field and Castle Air Force Base are as "big" as Fort Ord (no evidence at all on this), and, therefore, were each sold seven times the volume to Alameda. Thus Phillips arrives at the estimated volume to those four bases without proving *any* actual sales to those commissaries (Tr. p. 314).

It is said that, to the philosopher, Herbert Spencer, a tragedy was a syllogism disproved by facts. In this case appellees' estimated volume of sales to the five commissaries, based on the pyramid of guess upon guess, is completely disposed by the facts. If the volume at the five commissaries, Ord, Presidio, Mare Island, Mather Field and Castle Air Force Base had *each* been seven times the $11,000 volume at Ala-

meda Air Station, then the total volume in the 12 months of 1952 for these five bases *would have been $385,000* (5 x 7 x $11,000). Yet Phillips' total volume of sales for *all 21* commissaries in *16* months was only $94,000. This is "boot strap" argument and the straps are from seven league boots.

Compare, therefore:

Actual volume to 21 commissaries for 16 months	$ 94,000
Assumed volume to 5 commissaries for 12 months	$385,000

Furthermore, there was no evidence from which it could be inferred that conditions in the commissaries are relatively constant or that one is similar to another. In fact, Phillips' testimony shows that there are frequent changes in volume at the commissaries (e.g., at Ord where the number of items and volume of sales varied substantially from month to month). He admitted that making a profit at a commissary depends on the condition he is in at a particular base (pages 276-277), which, of course, can and does change from time to time. He never disclosed what condition he was in at the various commissaries. His testimony is to the effect that at three of the commissaries the particular purchasing officer, at time of termination, was "planning" to put in the Hunt line. These were Mather Air base (Trans. p. 127) Travis Field (Trans. p. 136) and at Treasure Island if certain other competitors could be eliminated (Trans. p. 147). Phillips also said that at Mare Island, the purchasing officer was an old navy friend

of his, and was planning to put the line in (Trans. p. 127) but up to the eve of termination Phillips had never sold at Mare Island (Trans. pp. 516 and 127), Hunt salesmen having done the job rather than Phillips. Whether a base would purchase the products of a particular company obviously depends on friendship with the officer, and there are many personnel changes at these military posts (Trans. p. 498). Even if there had been evidence from which future *volume* could be estimated, there is no basis for estimate of future *profits*.

1. Phillips' testimony concerned gross profit only—no evidence of business expenses.

All of Phillips' testimony relates to *Gross* profit. He introduced no evidence of his expense of doing business, so there is *no basis to estimate net profits.*

2. The uncertainties.

Phillips admits a profit "depends on the condition we were in in the base" (Trans. p. 320) but there is no evidence of what condition he was in at the respective commissaries.

3. The opinion as to future profit is pure guesswork.

Over the repeated objections of appellant on the grounds of lack of foundation and conclusions of the witness, Phillips (Trans. pp. 312-316), Phillips estimated that in the year after termination he might have made a gross profit of 20% to 25% on sales (Trans. pp. 319-320). Up to termination his gross profit for 12 months at Alameda Air Station was 7½% gross (Trans. p. 277) and for his specially se-

lected four months at Fort Ord, 5% gross (Trans. p. 302) and for the few months at Hamilton Field 4% gross (Trans. p. 302). He did not prove his total profit on all sales for the period he operated.

There is further and direct proof that the unsupported opinion of Phillips is pure speculation. He said that in order to realize his estimated future gross profit he would have to move his price up to that of everybody else and also eliminate competition (Trans. p. 320). Neither of these events occurred anyplace during his sixteen months of operation.

There is another essential factor missing if Phillips is to estimate his future gross profit. The evidence does not show what items (e.g. catsup, spinach, etc.) were sold at the various commissaries, yet Phillips says (Trans. p. 355) the amount of profit depends on what item is sold to a particular commissary at a particular time because the percentage of profit is greater on some items, less on others.

4. Competitors' prices prevent the estimated gross profit.

Hunt was the lowest price brand item on the shelves at the commissaries (Trans. p. 326) and there were only three different brands (Trans. p. 121). Hunt prices could not be increased to the level of the higher-priced competition, otherwise Hunt couldn't compete (Trans. pp. 356-357). This limitation is further shown but the fact that during the whole time Phillips was operating the differential between his *cost* and the *shelf price* of higher-priced similar products was about 22% (Trans. pp. 332-333). This is the differ-

ential that Phillips computed but in doing so he assumed that each competitor sold the same items in the same volume (Trans. pp. 348-350) (which was not the fact) and he made adjustment assumptions to take into account difference in sizes of cans among competitors (Trans. pp. 350-351, 362).

5. Chain store competition prevented the mark-up.

The opportunity for Phillips' mark-up is further limited by chain store competition with the commissaries. Hunt sold chain stores at the same price it sold to Phillips (Trans. p. 351) and Phillips could not raise his prices to any extent that would make the commissaries shelf price higher than at the nearby chain stores (Trans. pp. 351-352) otherwise the serviceman's wife would trade at the chain store. Mr. Steiger testified that the commissary shelf price of Hunt products was only 9% less than the Hunt shelf price at the chain stores (Trans. p. 503). The chain store prices were reduced on week ends (Trans. p. 498).